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Evidence - Expert Witness - Use of Authoritative Treatises on Cross-Examination

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The appellant argues that the proof shows that the relationship of the children's parents began illicitly and states that this overcomes the presumption of legitimacy of children. She urges on this court a rule which would require the children to produce some documentary proof of a wedding or a witness thereto in order to establish their legitimacy. . . . No one knows where the marriage took place, and it would be impossible for the appellees to check the records of every person authorized to perform marriages in the Midwest. While the appellee's proof is not the most convincing, we feel that when a man and woman say they are married and live together as man and wife until death parts them, there is a reasonable presumption that they in fact are married.[37]

While documentary proof or testimony was necessary to overcome the presumption of a continuation of an illicit relationship begun in the common-law era, the Illinois Appellate Court has held that it may be overcome by proof of cohabitation and reputation, even though proof of such is not the most convincing. This holding, however, is limited to the factual situation where both parties to the alleged marriage are deceased.[38] In relaxing the standards previously imposed, the court was clearly influenced by the presumption of validity of a ceremonial marriage, as opposed to a common-law marriage, and the strong presumption of the legitimacy of children.

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[37] *Supra* note 30 at 407, 210 N.E.2d at 832.

[38] *Id.* at 408, 210 N.E.2d at 833. "If one of the parties to this marriage were still alive, we might hold differently and rule that some documentary evidence would be necessary. In such case, it would be reasonable to assume that a party to a marriage would remember where the ceremony took place. . . ."

EVIDENCE–EXPERT WITNESS–USE OF AUTHORITATIVE TREATISES ON CROSS-EXAMINATION

Plaintiff entered defendant's hospital for treatment of a broken leg and was treated by a doctor who, with the assistance of hospital personnel, placed plaintiff's leg in a cast. Subsequently, the leg became infected, requiring partial amputation, and plaintiff brought suit, alleging improper care and treatment on the part of the doctor and the hospital. At trial, defendant's expert medical witnesses stated on direct examination that their opinions were based on their general experience and training. Plaintiff's counsel was permitted, over defendant's objection, to cross-examine them as to relevant extracts from standard authorities. The appellate court[1] affirmed the judgment for plaintiff and held that the strict reliance rule[2] espoused by earlier Illinois cases be expanded to allow the use on

[1] Darling v. Charleston Community Memorial Hospital, 50 Ill. App. 2d 253, 200 N.E.2d 149 (1964).

[2] "The law is well settled in this State that scientific books may not be admitted in evidence before a jury, and that such books cannot be read from to contradict an expert

cross-examination of any authoritative treatise that entered into the expert's general training. On appeal, the Supreme Court of Illinois affirmed, and expanded upon the appellate court's ruling by deciding that, henceforth, the use of authoritative texts would be liberally allowed on cross-examination of expert witnesses without regard to the expert's reliance upon or familiarity with the text. *Darling v. Charleston Community Memorial Hospital*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965).

By removing the former restrictions, the court has made a significant advance in the use of standard treatises on the cross-examination of expert witnesses in the State of Illinois. It will be the purpose of this note to examine the theories upon which the use of such texts are allowed or disallowed, and to examine the status of authoritative treatises as a tool in the cross-examination of expert witnesses.

It is difficult, from the conflict of cases, to say definitely what any one jurisdiction, on the basis of its past record, will follow as its rule of law in this area,[3] but basically the existing decisions fall into four general categories.

It is generally recognized that where an expert has specifically relied upon a treatise or text as supporting his opinion given on direct examination, he may be cross-examined from that text for purposes of showing that it does not in fact support his opinion.[4]

Other courts have extended this rule to permit a witness who has relied upon the authority of treatises in general to be cross-examined from works other than those specifically referred to, provided the authority of such works is otherwise satisfactorily established.[5] Still other jurisdictions

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witness except where such expert assumes to base his opinion upon the work of a particular author, in which case *that* work may be read . . . to contradict him." Ullrich v. Chicago City Ry. Co., 265 Ill. 338, 341–2, 106 N.E. 828, 828–9 (1914).

[3] The trial judges have broad discretion in controlling the extent to which learned treatises may be used on cross-examination of experts, and this may be one explanation for the apparent inconsistencies in the decisions of the different jurisdictions.

[4] Wall v. Weaver, 145 Colo. 337, 358 P.2d 1009 (1961); Drucker v. Philadelphia Dairy Products Co., 35 Del. 437, 166 Atl. 796 (1933); Eggart v. State, 40 Fla. 527, 25 So. 144 (1898); Fraga v. Hoffschlaegger Co., 26 Hawaii 557, 290 Fed. 146 (1923); Wilcox v. Crumpton, 219 Iowa 389, 258 N.W. 704 (1935); Clark v. Commonwealth, 11 Ky. 443, 63 S.W. 740 (1901); Pinney v. Cahill, 48 Mich. 584, 12 N.W. 862 (1882); Winters v. Rance, 125 Neb. 577, 21 N.W. 168 (1933); McCourt v. Travers, 87 N.H. 185, 175 Atl. 865 (1934); Conn v. Seaboard Air Line R.R. Co., 201 N.C. 157, 159 S.E. 331 (1931); Baldwin v. Gaines, 92 Vt. 61, 102 Atl. 338 (1917); Reed v. Church, 175 Va. 284, 85 S.E.2d 285 (1940).

[5] Reilly v. Pinkus, 338 U.S. 269 (1948); Dolcin v. Federal Trade Commission, 219 F.2d 742 (D.C. Cir. 1955); Morton v. Equitable Life Ins. Co., 218 Iowa 846, 254 N.W. 325 (1934); Olivierius v. Wicks, 107 Neb. 821, 187 N.W. 73 (1922); Laird v. Boston & M.R.CO., 80 N.H. 377, 117 Atl. 571 (1922); Lynch v. Rosemary Mfg. Co., 167 N.C. 98, 83 S.E. 6 (1914); Bruins v. Brandon Canning Co., 210 Wis. 387, 257 N.W. 35 (1934);

allow such questioning where the expert recognizes the authoritative status of the text, regardless of his reliance thereon.[6]

Lastly, an increasing number of courts, including the court in the instant case, have been liberal in permitting treatises or technical works to be used to test the witnesses' competency or qualifications, without imposing any requirement that the witness has relied upon the text, generally or specifically, or has recognized the authoritative status of the work, as long as its reputation is sufficiently established.[7]

It is to be emphasized that these standard works are not allowed to be read to the jury as evidence, and are limited to use on cross-examination for impeachment purposes. Apparently, Alabama is the only state whose holdings allow their use as evidence per se.[8] The reason for this limitation in each of the aforementioned rules is that textbooks and treatises are considered to be inadmissable hearsay.[9] This basis was noted by the court in the *Darling* case, and in referring to the former Illinois rule, they stated:

> It is supported by the considerations that support the hearsay rule, but the inapplicability of those considerations to scientific works has been convincingly demonstrated by Wigmore.[10]

Hearsay testimony has been defined as

Salgo v. Stanford University, 154 Cal. App. 2d 560, 317 P.2d 170 (1957); Denver City Tramway Co. v. Gawley, 23 Colo. App. 332, 129 Pac. 258 (1912).

[6] Kaplan v. Mashkin Freight Lines Inc., 146 Conn. 327, 105 A.2d 602 (1964); Osborn v. Cary, 28 Idaho 89, 152 Pac. 473 (1915); Briggs v. Chicago G.W.R. Co., 238 Minn. 472, 57 N.W.2d (1953); McComish v. DeSoi, 42 N.J. 274, 200 A.2d 116 (1964); People v. Feldman, 299 N.Y. 153, 85 N.E.2d 913 (1949); Texas Employees Insurance Assn. v. Nixon, 328 S.W.2d 809, (Texas Civ. App. 1959); Hopkins v. Gronovsky, 198 Va. 389, 94 S.E.2d 190 (1956).

[7] Moore v. State, 184 Ark. 682, 43 S.W.2d 228 (1931); Hess v. Lowry, 122 Ind. 225, 23 N.E. 156 (1890); Kentucky Public Service Co. v. Topmiller, 204 Ky. 196, 263 S.W. 706 (1924); State v. Sands, 226 La. 694, 77 So. 2d (1954); Louis Eckels & Sons Ice Mfg. Co. v. Cornell Economizer Co., 119 Md. 107, 86 Atl. 38 (1912); State v. Bess, 60 Mont. 558, 199 Pac. 426 (1921); Burnham v. Stillings, 76 N.H. 122, 79 Atl. 987 (1911); Byers v. Nashville, C. & St. Louis R. Co., 94 Tenn. 345, 29 S.W. 128 (1895); Dabroe v. Rhodes Co., 64 Wash. 2d 431, 392 P.2d 317 (1964); State v. Catallier, 63 Wyo. 123, 179 P.2d 203 (1947).

[8] "Some courts hold differently, but this court has long entertained the opinion that relevant extracts from medical treatises, recognized and approved by the medical profession as standard, may be read to the jury in evidence." Burfield v. South Highland Infirmary, 191 Ala. 553, 555, 68 So. 30, 34 (1913). *Accord*, Smarr v. State, 260 Ala. 30, 68 So.2d 6 (1953).

[9] CLEARY, ILLINOIS EVIDENCE § 11.10 at 192 (2d ed. 1963).

[10] Darling v. Charleston Community Memorial Hospital, 33 Ill. 2d 326, ——, 211 N.E.2d 253, 259 (1965).

. . . testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of matter asserted therein, and thus resting for its value upon the credibility of the out-of-court assertion.[11]

Under this rule, treatises are considered to be hearsay in that they purport to employ testimonially a statement made out of court by a person not subject to cross-examination.[12]

Additional reasons given for the limited use of such treatises are that scientific opinion is constantly changing; the possibility of jury confusion due to the use of highly technical language; and the unfair use of such texts by selecting passages that may be explained away or contradicted later in the book.[13]

Professor Wigmore argues that the two requirements usually necessary for an exception to the hearsay rule, i.e., necessity and trustworthiness, are present in the area of scientific works, and thus favors their use as evidence to be read to the jury. The unavailability and cost of producing these experts in court, plus the fact that these texts are not written with a view towards litigation and are thus unbiased, lead Wigmore to believe that the limitation of their use to cross-examination is not well founded.[14]

It could well be added, as points in favor of allowing the use of treatises for evidentiary purposes, that the testimony of the expert is ofttimes inaccurate and is in itself a form of hearsay.[15]

Prior to the decision in the noted case,[16] the Illinois courts, giving a strict interpretation to the hearsay theory set out above, restricted the use of standard works on cross-examination to those which the expert specifically relied upon as forming the basis of his opinion.[17] With two exceptions, this has been the law on this point in Illinois for the past sixty years.[18] In the states that follow the former Illinois rule, the only

[11] McCormick, Evidence § 225 at 460 (1st ed. 1954).

[12] 6 Wigmore, Evidence § 1690–1692 at 2 (3rd ed. 1940).

[13] *Id.* at 3–4.

[14] *Id* at 5–6.

[15] "Unless he is thoroughly versed in that hearsay he is not qualified to testify. The reasoning of courts excluding inquiries about the authorities, upon the cross-examination of the expert, leads directly to the conclusion that the opinion of the expert should have been excluded. If the cross-examination puts before the jury the unsworn opinion of the authority, the direct testimony of the expert does the same thing, with the added infirmity involved in his recollection of what the authorities say." Kern v. Pullen, 138 Ore. 222, 230, 6 P.2d 224, 227 (1931).

[16] Darling v. Charleston Community Memorial Hospital, *supra* note 10.

[17] City of Bloomington v. Shrock, 110 Ill. 219 (1884); Ullrich v. Chicago City Ry. Co., 265 Ill. 338, 106 N.E. 828 (1914); Wilcox v. International Harvester Co., 278 Ill. 465, 116 N.E. 151 (1917); Neiner v. Chicago City Ry. Co., 181 Ill. App. 449 (1913); Levitan v. Chicago City Ry. Co., 207 Ill. App. 384 (1917).

[18] The court, in Connecticut Mutual Life Ins. Co. v. Ellis, 89 Ill. 516 (1878), allowed the general use of treatises where the expert stated that he relied generally thereon;

apparent exception to it is in cases in which the witness has written the book sought to be used. This exception is founded in the rule of evidence which allows the impeachment of a witness by his own prior inconsistent statements, and applies whether he mentions the text or not.[19]

The questionable quality of expert testimony in general has brought sharp judicial criticism in the State of Illinois. In commenting on the testimony of medical experts, the court has stated:

> That class of evidence, however, is generally discredited and regarded as the most unsatisfactory part of judicial administration. This is with good reason, because the expert is often the hired partisan and his opinion is a response to a pecuniary stimulus. . . . The field of medicine is not an exact science, and the expert being immune from penalties for perjury, his opinion is too often the natural and expected result of his employment.[20]

The sophistication of modern expert testimony has also been partially credited with the large increase in damage allotments in recent years.[21]

Aside from criticism, there has also been judicial action in Illinois, in the form of Supreme Court Rule 17-2, which provides for impartial medical witnesses.[22]

As to the former Illinois restriction on the use of treatises, the Section on Civil Practice and Procedure of the Illinois State Bar Association expressed dissatisfaction with the former rule in their publications in the *Trial Briefs* series. Therein, it was pointed out that the "cagey" or "coached" witness could avoid the use of texts on cross-examination by

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and the court, in Chicago Union Tractor Co. v. Ertrachter, 228 Ill. 114, 81 N.E. 816 (1907), allowed their liberal use. Both decisions were cited in the appellate court decision of the noted case as supporting the less strict view therein adopted. See Darling v. Charleston Memorial Hospital, *supra* note 2.

[19] LaCount v. General Asbestos and Rubber Co., 184 S.C. 232, 192 S.E. 262 (1937). For a practical application of this exception, see GOLDSTEIN AND SHABAT, MEDICAL TRIAL TECHNIQUE 44 (1942).

[20] Opp v. Pryor, 294 Ill. 538, 545–6, 128 N.E. 580, 583 (1920).

[21] "The fluency of the contemporary doctor is a matter of amazement and perhaps envy to the profession supposed to have a monopoly on the use of language . . . little did the non-litigating public know the true rhetorical masterpieces that come from the lips of medical experts on the witness stands and how they, as much as the lawyers, shattered the aerial limits of verdicts in personal injury cases and made hundreds of thousands grow where only thousands grew before." Kemeny v. Skorch, 22 Ill. App. 2d 160, 170, 159 N.E.2d 489, 494 (1959).

[22] "When in the discretion of the trial court it appears that an impartial medical examination will materially aid in the just determination of a personal injury case, the court, a reasonable time in advance of the trial, may on its own motion or that of any party order a physical or mental examination of the party whose physical or mental condition is in issue. The examination shall be made without cost to the parties by a member or members of a panel of physicians chosen for their special qualifications by the Illinois State Medical Society." Supreme Court Rule 17-2, ILL. REV. STAT. ch. 110, § 101.17-2 (1965).

stating on direct that his opinions were based upon his general experience. This would preclude the use of texts as there would be none mentioned as being relied upon.[23] The Section called for a relaxation of the then existing rule, and in conjunction with Supreme Court Rule 17-2,[24] suggested that a list of authoritative treatises be drawn up for use on cross-examination.[25] These considerations appear to have entered the thinking of the court in the *Darling* case, wherein the prior rule has been considerably relaxed.

The Supreme Court of Illinois, in the case at bar, has provided for the liberal use of standard works on cross-examination and removed all prior restrictions upon their use that have heretofore existed in the decisions. The appellate court stated that the questions asked at trial did in fact meet the requirements laid down in the cases, but the Supreme Court, speaking through Justice Shaefer, considered that conclusion irrelevant:

> We do not consider that determination to ascertain whether every detail on cross-examination of each expert witness fits within the rule announced in those cases, for we are satisfied that the rule is not supported by sound reasons and should no longer be adhered to.[26]

As authority for this line of reasoning, the court cited the case of *Reilly v. Pinkus*,[27] wherein the Supreme Court of the United States, in referring to the strict reliance rule, stated:

> It is certainly illogical, if not actually unfair, to permit witnesses to give expert opinions based on book knowledge, and then to deprive the party challenging such evidence of all opportunity to interrogate them about divergent opinions expressed in other reputable books.[28]

The expert, the court in *Darling* continued, becomes such by studying and absorbing a body of knowledge:

> To prevent cross-examination upon the relevant body of knowledge serves only to protect the ignorant or unscrupulous expert witness. In our opinion expert testimony will be a more effective tool in the attainment of justice if

[23] Illinois State Bar Association, Section on Civil Practice and Procedure, 10 TRIAL BRIEFS 1–3 (Nov. 1964).

[24] *Supra* note 22.

[25] Illinois State Bar Association, Section of Civil Practice and Procedure, 7 TRIAL BRIEFS 1–2 (Nov. 1961).

[26] Darling v. Charleston Community Memorial Hospital, *supra* note 10 at ——, 211 N.E.2d at 259.

[27] Reilly v. Pinkus, 338 U.S. 269 (1948). *Accord*, Levine v. Barry, 114 Wash. 623, 631, 195 Pac. 1003, 1006 (1931), wherein the court stated: "The expert witness, because of his superior knowledge of the subject about which he is testifying may be a very useful or a very misleading or even dangerous, witness, and as to him the rules of cross-examination should be liberalized rather than restricted."

[28] *Id.* at 275.

cross-examination is permitted as to the views of recognized authorities, expressed in treatises or periodicals written for professional colleagues.[29]

As to which books or periodicals will be allowed, the court ruled that the author's competence is established "if the judge takes judicial notice of it,[30] or if it is established by a witness expert in the subjet."[31]

In rendering this decision, the court has effectively laid to rest the prior restrictions on the use of standard works on the cross-examination of expert witnesses, and given approval to the spirit, if not the letter, of the Uniform and Model Evidence Acts,[32] which are cited in the opinion as expressive of modern thinking in this area. The Uniform acts have re-received limited acceptance,[33] but their philosophy in this regard has received scholarly[34] and judicial approval.

The import of this decision upon future Illinois litigation will be to control the abuses inherent in the utilization of expert testimony in civil and criminal cases[35] and to assist court and counsel in reaching the truth traditionally sought by way of cross-examination. While this case was involved with a doctor and a hospital administrator as experts, the decision is not limited to those two categories of experts, since the court speaks of expert witnesses in general terms. By doing away with the requirements that the expert rely on the text specifically or generally, or admit its authoritativeness, the court has left the way open for an effective check upon the influence of the "partial" expert witness.

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[29] *Supra* note 10 at _____, 211 N.E.2d at 259.

[30] The suggestion of the Section on Civil Practice and Procedure of the Illinois Bar as to book lists in conjunction with Supreme Court Rule 17-2, could also be utilized in line with this ruling as to judicial notice.

[31] *Supra* note 10.

[32] NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM LAWS, UNIFORM RULE OF EVIDENCE 63(31): "Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissable except: Learned Treatises, a published treatise, periodical or pamphlet on a subject of history, science or art to prove the truth of matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical or pamphlet is a reliable authority on the subject." The *Uniform* and *Model Code* both allow the use of treatises as evidence and contain identical wording in this area. See AMERICAN LAW INSTITUTE, MODEL CODE OF EVIDENCE, Rule 529.

[33] As of date, the model Code has not been adopted in any jurisdiction, but the Uniform Act has been adopted in Kansas, the Virgin Islands, and the Panama Canal Zone. See KAN. GEN. STAT. ANN. § 60-401-60-470 (1964); 5 C.Z. CODE § 2731-2996 (1965); 5 V.I. CODE § 771-956 (1957).

[34] See Symposium, *The Uniform Rules of Evidence*, 10 RUTGERS L. REV. 479, 646 (1956).

[35] The courts do not draw a distinction between civil and criminal cases in regard to the use of standard texts on cross-examination. Willens, *Cross-Examining the Expert with the Aid of Books*, 41 J. CRIM. LAW 192 (1950).